SAJ RANHILL SDN BHD v. SWM GREENTECH SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: J-02(NCvC)(W)-2216-11-2021]
19 MAY 2023

Abstract – *(i) In order to determine a breach of duty of care, the balance between the risks and the cost of practical measure to eliminate it is an important feature that would determine whether there is a breach of duty. Even if one party has taken all reasonable care, it would not of itself exonerate it from liability, thus preventive measures taken may not assist the relevant party. A party is found liable in negligence where the ingredients of negligence, namely duty of care, breach of duty of care and resulting damage, not being remote, has been proved, especially in cases where evidence points toward proximate cause of shutdowns and foreseeability of harm is obvious; (ii) Economic loss consequent to physical or property damage is recoverable but pure economic loss independent of physical or property damage is not.*

TORT: *Negligence – Breach of statutory duty – Ammonia pollution spillage from landfill causing contamination and shutdown of water treatment plant – Proximate cause – Whether act complained of near or close in time to shutdowns – Whether preventive measures taken would exonerate liability – Whether operators of landfill liable in negligence – Whether pure economic loss independent of physical or property damage recoverable – Whether nominal damages ought to be awarded*

DAMAGES: *Claims – Pure economic loss – Negligence – Breach of statutory duty – Whether pure economic loss independent of physical or property damage recoverable – Whether nominal damages ought to be awarded*

The appellant filed a claim against the respondents, premised on negligence, nuisance and breach of statutory duty. The claim arose from the shutdown of the appellant's water treatment plant ('WTP') which was alleged to be caused by leachate spillage from the respondents' landfill. The WTP was located along Sungai Benut, and was downstream from the landfill. The appellant abstracted raw water from Sungai Benut which was then treated at the WTP. Several shutdowns of the WTP occurred where the water supply from Sungai Benut was contaminated and contained a high level of ammonia above the approved standard of 1.5ppm (parts per million) specified in the National Standard issued by the Ministry of Health. According to the appellant's investigations, the high ammonia level was caused by leachate

A pollution where the source was traced to the landfill. It was also said that one of the bunds at the landfill had collapsed whereby the untreated effluents and leachate had overflowed from the leachate pond and spilled into Sungai Benut. The eight incidents of shutdown of the WTP formed the basis of the appellant's claim. The shutdowns resulted in the appellant suffering loss and
B damage, thus launching the appellant to make a claim based on negligence and a breach of statutory duty in discharging effluents above the parameter limits and nuisance. On negligence, it was pleaded in essence that the respondents owed a duty of care to the appellant that there would be no overflow of untreated effluents and leachate contaminating Sungai Benut by
C the proper maintenance of the leachate ponds and bunds. The respondents' primary defence was the absence of any causal connection between the leachate overflow and the shutdown of the WTP and that there were other likely sources of ammonia pollutants and unprecedented rainfall that had caused an overflow of waste and leachate within the landfill. According to the respondents, the appellant, being a downstream operator and aware of the
D risk of pollutants by upstream operators, failed to equip itself and thereby contributed to the shutdown due to its own want of care. The respondents further averred that the appellant had not pleaded any physical loss or damage and was consequently, not entitled to claim the losses suffered. The High Court, however, found that the parties who were the primary cause of
E the whole debacle were the owners of the landfill and not the respondents who were only operators appointed to manage the landfill. The High Court held that the respondents were thus not liable in negligence. Hence, this appeal. The thrust of the appeal was that, although the High Court found the cause of ammonia pollution to be the spillage of untreated leachate from the
F respondents' landfill, yet the claim for negligence failed as the primary cause was held to be the location of the landfill upstream, the poor design of the landfill and the overcapacity of the landfill due to the dumping of waste from districts. It was submitted that the High Court had wrongly applied the 'but for' test when it ought to have determined the proximate cause of the
G shutdowns.

Held (allowing appeal)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The purpose of the 'but for' test was intended as a filter to exclude irrelevant causes for the purpose of establishing liability. The 'but for'
H test is a factual inquiry and a first step to determine *causa sine qua non* factors, without which damage could not have occurred. The second step is a legal inquiry to determine *causa causans* which is the effective factor. Therefore, what the court should concern themselves with, was the effective factor or the proximate cause. (paras 27-31)

I

(2) The effective factor or the proximate cause would be that the act complained of is very near or close in time to the shutdowns. This would be the spillage of leachate from the landfill which led to the ammonia pollution. The respondents admitted to incidents of leachate spillage into Sungai Benut in November 2016 and some instances in 2017 and early 2018. The dates mentioned overlap with the eight occasions of shutdown. In addition, the evidence of DW1, the senior manager on operations of facilities at the landfill, supported incidents of leachate overflow from the landfill in 2016 and 2017, *albeit* for different reasons. Arising from the above, the three factors identified by the High Court as the cause were, historical in the case of location where the landfill had been in operation since 1995; not proven, in the case of poor design as it ran counter to the operational and management agreement between the respondents and the government ('O&M') where Appendix X on the list of equipment to be repaired, refurnished or upgraded was stated as 'not applicable'; and not probable, in the case of overcapacity where under the O&M, the respondents were allowed to accept waste from third parties. Therefore, the High Court's judgment in laying responsibility on the doors of the owners of the landfill and the local authorities, had to be viewed as not being the proximate cause. (paras 32-45)

(3) In order to determine a breach of the duty of care, the balance between the risks and the cost of practical measure to eliminate it was an important feature that would determine whether there was a breach of duty. It would be seen with reference to *Cambridge Water Co v. Eastern Counties Leather Plc*, '… it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user …'. Thus, the preventive measures taken, did not assist the respondents. These evidences could only point towards the proximate cause for the ammonia pollution being the leachate spillage from the landfill. The foreseeability of harm to the downstream users, of which the appellant was one, was plain and obvious. Thus, the respondents were liable in negligence where the ingredients of negligence, namely duty of care (admitted by the respondents), breach of duty of care, and resulting damage not being remote, had been proved. (paras 47-52)

(4) The appellant confirmed its claim was one of pure economic loss. There was no physical or property damage and none had been pleaded. The issue arising was whether absent any physical and/or property damage, pure economic loss was recoverable. However, economic loss consequent to physical or property damage was recoverable but pure economic loss independent of physical or property damage was not.

A Thus, nominal damages could be awarded in respect of the respondents' negligence. Taking into account the eight occasions of shutdown of the WTP and the ammonia pollution caused, the nominal damages of RM100,000 were awarded. (paras 54-70)

Case(s) referred to:

B *Armstrong, Carol Ann v. Quest Laboratories Pte Ltd & Anor And Other Appeals [2020] 1 SLR 133* ***(refd)***

Cambridge Water Co v. Eastern Counties Leather Plc [1994] 2 AC 264 ***(refd)***

Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA ***(refd)***

C *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC* ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] 1 LNS 118 FC ***(refd)***

Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat Sidhu Adek Beradek Sdn Bhd & Anor [2014] 6 CLJ 382 HC ***(dist)***

D *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC* ***(refd)***

UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

Legislation referred to:

E Rules of the Court of Appeal 1994, r. 8

Other source(s) referred to:

Clerk & Lindsell on Torts, 23rd edn, pp 61, 62

For the appellant - Adi Radlan Abdul Rahman; M/s Adi Radlan & Co

For the respondents - Saranjit Singh; Nik Nur Iman Nik Abdul Rashid; M/s Saranjit Singh

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[Editor's note: For the High Court judgment, please see SAJ Ranhill Sdn Bhd v. SWM Greentech Sdn Bhd & Anor [2022] 3 CLJ 712 (overruled).]

Reported by Suhainah Wahiduddin

G

JUDGMENT

See Mee Chun JCA:

Introduction

H **[1]** The appellant as the plaintiff had filed a claim against the respondents as the defendants premised on negligence, nuisance, the rule in *Rylands* and breach of statutory duty. The claim arises from the shutdown of the appellant's water treatment plant (WTP) in Simpang Renggam, Kluang, Johor, which is alleged to be caused by leachate spillage from the respondents' landfill, also in Simpang Renggam.

I **[2]** The High Court had dismissed the claim. We allowed the appeal and our reasons now follow.

Parties

[3] The appellant is in the business of the abstraction of raw water, treatment of water, distribution and sale of treated water to consumers in Johor. It is the operator of the WTP in Simpang Renggam.

[4] The first respondent is the statutory operator of a landfill located at Tapak Pelupusan Ladang CEP 1, Jalan Kluang, Renggam, Johor (landfill). The second respondent had been operating and managing the landfill. Around November 2016, the second respondent novated its rights and obligations in respect of the operation, management and maintenance of the landfill to the first respondent.

Background Facts

[5] The WTP is located along Sungai Benut, and is downstream from the landfill. The appellant abstracts raw water from Sungai Benut which is then treated at the WTP. Sungai Benut is gazetted as a water catchment area under the Fourth Schedule to the Environmental Quality (Sewerage and Industrial Effluents 1979) (EQR 1979) under the Environmental Quality Act 1974 (EQA).

[6] The first shutdown of the WTP happened on 20 November 2016 where the raw water supply from Sungai Benut was contaminated and contained a high level of ammonia above the approved standard of 1.5ppm (parts per million) specified in the National Standard issued by the Ministry of Health. According to the appellant's investigations, the high ammonia level was caused by leachate pollution where the source was traced to the landfill.

[7] Another shutdown took place on 23 January 2017. The appellant's investigations revealed that the pollution at Sungai Benut was caused by the leakage of untreated effluents and leachate which originated from the landfill. It was also said that one of the bunds at the landfill had collapsed whereby the untreated effluents and leachate had overflowed from the leachate pond and spilled into Sungai Benut.

[8] All in all, there were eight incidents of shutdown of the WTP, attributed to the leakage of untreated effluents and leachate which originated from the landfill. Other than the two earlier mentioned, the rest were on 27 May 2017, 30 June 2017 (two occasions), 2 January 2018, 12 January 2018 and 18 January 2018.

[9] Leachate is explained in the appellant's expert report as follows:

> **What is leachate? Leachate** is any liquid that, in the course of passing through matter, extracts soluble or suspended solids, or any other component of the material through which it has passed. Leachate is a widely used term in the environmental sciences where it has the specific

meaning of a liquid that has dissolved or entrained environmentally harmful substances that may then enter the environment. It is most commonly used in the context of land-filling of putrescible or industrial waste. In the narrow environmental context leachate is therefore any liquid material that drains from land or stockpiled material and contains significantly elevated concentrations of undesirable material derived from the material that it has passed through. (Source: Wikipedia)

The Appellant's Claim

[10] The eight incidents of shutdown of the WTP formed the basis of the appellant's claim. These have been particularised in Annexure A to the statement of claim (SOC, encl. 17/97-99).

[11] The shutdowns resulted in the appellant suffering loss and damage. It launched a claim based on negligence (paras. 23 to 31), breach of statutory duty in discharging effluents above the parameter limits (para. 23), nuisance (paras. 31 to 35) and the principles of *Rylands* (para. 37).

[12] On negligence, it was pleaded in essence that the respondents owe a duty of care to the appellant that there will be no overflow of untreated effluents and leachate contaminating Sungai Benut by the proper maintenance of the leachate ponds and bunds. The particulars of negligence are set forth in para. 29 of the SOC:

Particulars of Negligence

(a) the Defendants failed to take reasonable action and/or measures to ensure that the Landfill, the leachate pond and bunds were in good working order and properly maintained at all times;

(b) the Defendants failed to comply with the directions given by BAKAJ and JAS after the 2nd Incident to repair the damaged bunds at the Landfill to prevent spillage of untreated effluents and leachate into Sungai Benut and to avoid any further similar incidents from happening;

(c) the Defendants failed to repair the damaged bunds at the Landfill to prevent spillage of untreated effluents and leachate into Sungai Benut that caused the numerous pollution incidents to occur, particulars of which are contained in Annexure A to the Statement of Claim; and

(d) the Defendants failed to take reasonable action and/or measures to ensure there were no overflow from the leachate pond and spillage of untreated effluents and leachate pollution into Sungai Benut which is a gazetted catchment area under the EQR 1979.

[13] The appellant's claim is for loss, expenses and damages suffered due to the shutdown of the WTP and exemplary damages (para. 50(b) and (c) of the SOC).

The Respondents' Defence

[14] In para. 49 of the statement of defence (SOD), the respondents do not deny their duty of care owed to users of Sungai Benut. It however went on to deny any breach of duty.

[15] The primary defence was the absence of any causal connection between the leachate overflow and the shutdown of the WTP. It was pleaded there were other likely sources of ammonia pollutants including Indah Water Konsortium (IWK) sewage plants within 2km of the WTP; unprecedented rainfall throughout 2016 and 2017 that had caused an overflow of waste and leachate within the landfill (which is referred to as facility in the SOD) wherein refurbishing and upgrading took place with the pre-emptive steps being listed in para. 40(a) to (k) of the SOD and that the appellant being a downstream operator and aware of the risk of pollutants by upstream operators, failed to equip itself and thereby contributed to the shutdown due to its own want of care.

[16] It was also averred in para. 71 of the SOD that the appellant had not pleaded any physical loss or damage and is consequently not entitled to claim the losses suffered. Further, the conduct and actions of the respondents were not wilful or intentional so as to entitle the claim for exemplary damages (para. 74 of the SOD).

Decision Of The High Court (HC)

[17] The grounds of judgment of the HC (GOJ) is in encl. 14/19-45.

[18] The HC had referred to the evidence of the appellant's expert, Dr Maketab bin Mohamed (PW7), where his opinion was that the cause of ammonia pollution in Sungai Benut on the dates of the shutdown was the leachate overflow from the landfill (para. 23, GOJ). It was next stated in para. 24:

> [24] PW7's comments on the overall cause of pollution to Sungai Benut is noteworthy because although he had identified the CEP 1 Landfill as the primary contributor of high ammonia content in Sungai Benut, he put the blame squarely on the authorities for their failure to anticipate the highly likely incidents of pollution by choosing the location of a landfill upriver from the Plaintiff's WTP.

[19] Further reference to PW7's report was made which indicated that the leachate water treatment ponds were not well designed and managed.

[20] The HC in para. 34 applied the principles of this court in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd* [2012] 7 CLJ 337; [2013] 2 MLJ 29 on the "but for" test to determine causation, namely whether the damage would not have been caused but for the respondents' conduct/omission. This was next said in para. 35 of the GOJ:

A [35] … I find that the primary cause of the spillage of leachate from the ponds which then caused an excessive amount of leachate flowing into Sungai Ulu Benut, and then into Sungai Benut are:

i. The location of the CEP1 Landfill upstream, which is a high risk factor;

B ii. The poorly designed landfill, which could not handle the incidences of unusually heavy rainfall, that did occur during the periods of leachate overflow and bund collapse; and

iii. The decisions by the local authorities to dump waste from other districts in the CEP 1 Landfill, which was way beyond the capacity C of the landfill to handle.

Thus, the parties who were the primary cause of the whole debacle were the owners of the landfill (instead of the Defendants who were only operators appointed to manage the landfill) and the local authorities, who, with same reasonable enquiry and investigation, would have known that D such incidents are inevitable, bearing in mind the capacity of the landfill and the dilapilated state of the LTP on the site.

Those parties bear the primary responsibility for the debacle, and should have been made defendants. However, the Plaintiff chose to claim only against the Defendants.

E **[21]** The respondents were thus found not liable in negligence.

[22] On damages, the HC stated that the appellant's claim was for economic loss which is not allowed in law. Only nominal damages would have been awarded had the respondents been found liable.

F **Our Decision**

Liability

[23] Although the appellant's claim is premised on four causes of action, we find that the claim founded on negligence is sufficient to dispose of the appeal. We do not think it necessary to deal with the other causes of action.

G

[24] The thrust of the appeal is that although the HC found the cause of ammonia pollution to be the spillage of untreated leachate from the respondents' landfill, yet the claim for negligence failed as the primary cause was held to be the location of the landfill upstream, the poor design of the landfill and the overcapacity of the landfill due to the dumping of waste from H districts. It was submitted the HC had wrongly applied the "but for" test when the HC ought to have determined the proximate cause of the shutdowns.

[25] The respondents' submission was that it agreed with the conclusion to I dismiss the claim for negligence but not on the route taken on some matters relating to the basis on which the conclusion was reached. When asked as to which part the respondents agreed with, the response was that it "can't agree with PW7", which is the appellant's expert.

[26] We find that as the respondents had not cross-appealed against the finding of the HC that the cause of ammonia pollution was the spillage of untreated leachate from the respondents' landfill, it does not lie on them to now challenge that part of PW7's evidence and his expert report. We do recognise that the respondents could not file a cross appeal under r. 8 of the Rules of the Court of Appeal 1994 as they are not contending that the decision of the HC should be varied. The decision of the HC is in their favour and there is nothing for them to vary. However, as the evidence of PW7 was part of the factual findings of the HC, the respondents are not at liberty to take the position that the evidence of PW7 cannot be part of the route upon which the HC arrived at its conclusion.

Proximate Cause And "But For"

[27] With regard to the proximate cause as against the "but for" test, we agree with the appellant that the purpose of the "but for test" is intended as a filter to exclude irrelevant causes for the purpose of establishing liability.

[28] The leading text book *Clerk & Lindsell on Torts,* 23rd edn had this to say at pp. 61 and 62:

> 2. Factual Causation
>
> **(a) The "but for" test**
>
> The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the "but for" test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The "but for" test asks: would the damage of which the claimant complains have occurred "but for" the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that "but for" the defendant's wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant's conduct is not a "but for" cause. … It is worth bearing in mind that the "but for" test functions as an exclusionary test, *ie*, its purpose is to exclude from consideration irrelevant causes. The fact that the defendant's conduct is found to be a cause, applying the "but for" test, is not conclusive as to whether he should be held responsible in law since the function of the causal enquiry in law is to determine which causes have significance for the purpose of attributing legal responsibility. It is sometimes said that the law seeks the *causa causans* (effective factor) rather than the *causa sine qua non* (factor (s) without which damage could not have occurred).

[29] It bears reiterating that the "but for" test is a factual inquiry and a first step to determine *causa sine qua non* factors, without which damage could not have occurred. The second step is a legal inquiry to determine *causa causans*, which is the effective factor.

[30] In a Singapore Court of Appeal case of *Armstrong, Carol Ann v. Quest Laboratories Pte Ltd & Anor And Other Appeals* [2020] 1 SLR 133, this was said at p. 161:

> 87 The "but for" test only serves as a first filter to exclude irrelevant causes. As H L A Hart and Tony Honore have observed, there remains a potentially infinite number of necessary conditions fanning back in time (see *Causation in the Law* (Oxford University. Press, 2nd Ed, 1985) at p. 69; see also *Sunny Metal* at [53]). For instance, a necessary condition for a driver to have caused injury to a pedestrian would be the asphalt laid on the road some years back. But it would be absurd to hold the asphalt layer liable for the driver's negligence. To resolve these difficulties, the courts undertake inquiries into causation in law, which is an attributive question as to whether the defendant should be made responsible for the consequences of his actions that have befallen the plaintiff. Put another way, legal causation consists of picking out one or more necessary conditions (*ie*, the *causa causans* as opposed to the *causa sine qua non*) which are in a sense "more important" than the mass of conditions that makes up the background of the causal picture (see *Atiyah on Compensation* at pp. 98-99).

Proximate Cause

[31] Therefore, what we should concern ourselves with, is the effective factor or the proximate cause as per *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389. At p. 408, the Federal Court considered whether defendants are joint tortfeasors in a case involving different acts of negligence by multiple defendants committed at different times. The Federal Court said at p. 409:

> [27] … In my view, the first sentence in that passage is sufficiently clear. I would repeat it for emphasis – 'where the injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury, must compensate for the whole of it'. …

The passage being referred to is set out in para. 26 of the case and the first sentence states "Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury, must compensate for the whole of it."

[32] In this instant case, the effective factor or the proximate cause as per *Steven Phoa* would be that the act complained of is very near or close in time to the shutdowns. This would be the spillage of leachate from the landfill which led to the ammonia pollution.

[33] *Black's Law Dictionary* defines "proximate" as "immediately before or after" and "very near or close in time". It follows that the finding in para. 35 of the GOJ which we have set out earlier, that "the spillage of leachate from the ponds which then caused an excessive amount of leachate flowing into Sungai Ulu Benut and then into Sungai Benut" was the proximate cause of the shutdowns since it was the closest in time.

[34] This was what PW7 said in his expert report dated 2 August 2019 (encl. 20/187-209): A

E. Sources Of Pollution

5.1 The main source of the ammonia pollution in Sg Benut is undeniably the leachate from SW M Ladang CEP Landfill near Renggam (Figures 8 to 11). B

5.2 Massive ammonia pollution coincided with the overflow or pond breach of untreated leachate (Figure 16 (a) to (h)).

…

5.8 There are other ammonia pollution sources such as from the town of Simpang Renggam domestic wastewater treatment (Sg Berembong) and from the chicken farms in Sg Machap watershed, from Indah Water Konsortium (IWK) sewerage plants and from the Simpang Renggam prison which are located much closer to the Simpang Renggam Water Treatment plant but the pollution loads from these sources are miniscule relative to the massive load from the landfill. C D

…

5.12 The distance between the SWM CEP Landfill and the Simpang Renggam Water Treatment Plant is approximately 15km. The issue is whether, the pollution was exclusively caused by effluent discharged from CEP 1 estate which is located not less than 15km distance from RSAJ's treatment plant. E

5.13 In my opinion, distance of the source of pollution is not critical in the closure of Simpang Renggam Water Treatment Plant. This is due to the fact that Sg Ulu Benut and Sg Machap are relatively small streams with small dilution factors. If the receiving river is large such the downstream part of Sg Muar, which has a relatively large dilution factor, the impact of the same amount leachate would be minimal. F

[35] PW7's conclusions are as stated below: G

I. Conclusions

9.1 On the first issue: "Whether pollution to raw water with ammonia content exceeds 1.5ppm around the plaintiffs treatment plant was exclusively caused by effluent discharged from CEP 1 Estate landfill which is located not less than 15km distance from the plaintiff's treatment plant." H

My answer will be in the affirmative on the dates of the events mentioned at the Introduction section above. The distance of the CEP 1 Estate landfill has little bearing on the presence of ammonia in the water as explained above. I

A 9.2 On the second issue: "Whether raw water pollution around the plaintiff's treatment plant was caused by effluent discharged from IWK sewerage plants located in a radius of less than 2km from the plaintiff's treatment plant or from poultry farm and prison which were located in a radius of less than 10km distance."

B My answer will be in the negative. As explained above, the discharges from the IWK sewerage from the town of Simpang Renggam and Simpang Renggam prison are minimal continuous discharges, with minimum pollution load as compared to the deluge coming from the CEP Estate landfill especially due to overflowing or bund breach of the leachate ponds. Meanwhile, the poultry farm does not play any recent role C in the ammonia pollution due to the corrective measures carried out after the initial problems.

[36] The evidence of PW7 on the spillage of leachate from the landfill leading to the ammonia pollution, is supported by the evidence of PW6, Mohd Riduan bin Mohd Ali, the Director of Badan Kawal Selia Air Johor D (BAKAJ) where BAKAJ had gone to the site on the dates in question to determine the source of the pollution.

[37] In PW6's Q&A 10 (encl. 20/163), the evidence was as follows:

S: Boleh tuan terangkan berkenaan tindakan yang BAKAJ ambil selepas diberitahu mengenai penutupan LRA simpang Renggam pada 20-11-2016. E

J: Pihak BAKAJ mengadakan siasatan tapak pada 20-11-2016 untuk mengenalpasti punca pencemaran tersebut. Hasil siasatan mendapati terdapat limpahan dua kolam takungan effluent Tapak Pelupusan Sisa Pepejal Ladang CEP, Renggam yang penuh melepasi ke anak Sungai Ulu Benut tanpa dirawat. F

Pihak BAKAJ telah mengarahkan pihak pengurusan tapak pelupusan sampah tersebut mengepam effluent di dua kolam takungan tersebut ke Kawasan lembah dalam Kawasan tapak yang mampu menampung jumlah kapasiti effluent. Pihak SWM dicadangkan membuat rawatan MLTP di tambah ke tahap maksimum 22-24 jam sehari ketika musim hujan lebat. G

Pihak BAKAJ telah memajukan surat kepada Jabatan Pengurusan Sisa Pepejal Negara bil. SUKJ (BAKAJ) 334/570/3 Jld. 2 bertarikh 3 Januari 2017 untuk makluman dan tindakan.

[38] The same outcome was reported on the other dates, where in addition thereto, it was stated "Ini adalah disebabkan tebing kolam takungan leachate H telah runtuh sehingga menyebabkan leachate limpah keluar bersama timbunan sampah". This may be seen from Q&A 14 to 18 (encl. 20/164-166). BAKAJ would also orally direct the respondents to stop the spillage and to "menjalankan kerja penambahbaikan tebing kolam takungan leachate yang runtuh". It is in this context that PW6 said he had no written reports. I In any event, as stated by PW6 in Q&A 20 (encl. 20/167), the respondents had never raised any objection throughout:

S: Adakah apa-apa bantahan yang wakil Defendan-Defendan pada bila-bila masa? A

J: Tiada bantahan daripada wakil Defendan-Defendan kerana pihak BAKAJ akan menyusur sungai terlebih dahulu sebelum mengenalpasti punca pencemaran. Di dalam kes ini sepertimana soalan no. 5, punca pencemaran Sungai Benut dikenalpasti daripada Tapak Pelupusan Sisa Pepejal Ladang CEP, Renggam. Defendan-Defendan juga mengakui bahawa terdapat leachate yang melimpah disebabkan bund pecah atau melimpah kerana kolam rawatan effluent telah penuh. B

[39] The respondents had, through their solicitor's letter dated 27 April 2018 (encl. 9/201), admitted to incidents of leachate spillage into Sungai Benut in November 2016 and some instances in 2017 and early 2018. The dates mentioned overlap with the eight occasions of shutdown. However, the aforesaid letter did go on to state these were primarily due to very heavy rainfall and the existing leachate treatment plant being upgraded. C

[40] In addition, the evidence of DW1 (Ng Weng Mun, Senior Manager on operations of facilities at landfill) would also support incidents of leachate overflow from the landfill in 2016 and 2017 (Q&A 26, encl. 21/50) *albeit* for different reasons. D

Location, Design And Overcapacity E

[41] Arising from the above, we find that the three factors identified by the HC as the cause were, historical in the case of location where the landfill has been in operation since 1995; not proven, in the case of poor design as it runs counter to the Operational and Management Agreement dated 17 July 2017 between the respondents and the Government (O&M) where Appendix X on the list of equipment to be repaired, refurnished or upgraded is stated as "not applicable" (encl. 22/112); and not probable, in the case of overcapacity where under the O&M, the respondents are allowed to accept waste from third parties. F

[42] On location, the HC had in paras. 25 and 26 picked up on PW7's evidence on a landfill upstream from water intake and "why Majlis Daerah Simpang Renggam not think about what to happen", and that the presence of the landfill upstream of the WTP is a "Big No-No". As earlier indicated, this is a historical factor. G

[43] On design, taking the date of O&M to be 2017, where not only was it stated "not applicable" for equipment to be repaired, refurnished or upgraded, this would render the issue to be a historical factor. H

[44] On overcapacity, we would refer to cls. 15 and 16.1 of the O&M which provides for payment of agreed tipping fees and incoming solid waste sent by third party collector. The evidence of DW1 in his Q&A 7(b), (c) and (d) (encl. 21/42-43) is also relevant: I

A7:

…

(b) The 2nd Defendant was contracted by Simpang Renggam local council to operate and maintain the dumping ground from 2003 onwards. During the period from 2003 until end 2006, the CEP Landfill was received less than 100 tons per day of waste from Simpang Renggam district.

(c) From 2007 onwards, the 2nd Defendant was directed by the local government to accept the municipal solid wastes from other local councils to CEP Landfill, mainly Batu Pahat and Kluang. This directive was due to the closure of the other landfills and the 2nd Defendant was then receiving about 500 tons of waste per day.

(d) At this point in time, the Landfill was still merely a dumping ground. The additional waste had filled the landfill than what the initial projection was when the 2nd Defendant was only taking waste from Simpang Renggam council.

This would show that overcapacity started as early as 2007, and would at best be a historical factor.

[45] Therefore, that part of the HC GOJ in para. 35 which we have set out earlier, which laid the responsibility on the doors of the owners of the landfill and the local authorities, have to be viewed as not being the proximate cause.

Preventive Measures

[46] The further contention was that preventive measures had been taken as outlined in para. 40(a) to (k) of the SOD to prevent and abate events of overflow and any consequent spillage. This was also the evidence of DW1 and DW3. Effectively, this meant the respondents had discharged their duty of care.

[47] Reference was made to *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] 1 LNS 118; [1976] 2 MLJ 35 that in order to determine a breach of the duty of care, the balance between the risks and the cost of practical measure to eliminate it is an important feature that would determine whether there was a breach of duty. This was said at p. 41:

> Since the greater the magnitude of the possible injury, the greater must be the duty of care, my view is that the appellants cannot escape liability unless they were shown to have exercised a degree of care, commensurate with the risk, not only in the building and maintenance of the bund, but also in guarding it against damage by all foreseeable causes, including excessive stresses and strains. Their duty in this respect would only be subject to the qualification stated by Lord Reid, that action to eliminate the risk "presented no difficulty, involved no disadvantage and required no expense." In the present context I would, with the greatest respect, substitute for the last two words the phrase "no unreasonable expenditure."

[48] We note in para. 41 of the SOD, it was also pleaded that the preventive measures in para. 40 were enhanced and improved on. This begs the question of the effectiveness of the measures.

[49] However, it will also be seen with reference to *Cambridge Water Co v. Eastern Counties Leather Plc* [1994] 2 AC 264 at p. 300:

> … it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user …

[50] Thus, the preventive measures taken, do not assist the respondents.

Liability On Negligence

[51] These evidence as outlined above can only point towards the proximate cause for the ammonia pollution being the leachate spillage from the landfill. As found by the HC in para. 32 of GOJ, the foreseeability of harm to the downstream users, of which the appellant is one, is plain and obvious.

[52] We would thus find the respondents liable in negligence where the ingredients of negligence, namely duty of care (admitted by the respondents in para. 49 of the SOD), breach of duty of care, and resulting damage not being remote, have been proved.

Damages

[53] With regard to damages, the losses suffered by the appellant is set out in para. 45 of the SOC. After detailing the costs for each item of claim, the summary can be seen in para. 45F (encl. 17/89) as follows:

(F) Total Losses Suffered And Expenses Incurred By The Plaintiff Due To The Closure Of The WTP

Item	Losses And Costs (RM)
(A) Losses suffered due to the closure of WTP	406,669.98
(B) Total Costs incurred for Renting the Water Tanker	18,709.00
(C) Total Costs incurred to increase the standard of Chlorine Dosage System	285,319.14
(D) Total Costs incurred for other jobs in relation to the WTP and the River to improve the water treatment process	941,704.00
(E) Demand for Alternative water supply	3,882.10
Total Overall Claims	**1,656,284.22**

[54] The appellant confirms its claim is one of pure economic loss. There is no physical or property damage and none has been pleaded. The issue arising is whether absent any physical and or property damage, pure economic loss is recoverable.

[55] The appellant referred to a series of Federal Court cases, *Steven Phoa, UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737, *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734 and *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] 5 MLJ 561 that there is no blanket prohibition against pure economic loss negligence claims. It was further submitted that the courts are not prepared, for purely policy reasons, to impose a duty of care on a culpable defendant, only in certain specific fact situations, where the claim is for pure economic loss.

[56] Hence in *Steven Phoa* and *UDA Holdings*, it was as against a local authority, in *Lok Kok Beng*, against an architect for a duty of care not assumed; and *Batu Kemas Industri* for power disruption or failure.

[57] Much reliance was placed on *Batu Kemas Industri* that there was no blanket prohibition and it was only confined to instances where the damage is caused by power disruption or failure. We were referred to the following passages in p. 734, 736 to 746 (CLJ); pp. 608 to 609 and 618 to 619 (MLJ):

> [78] Thus, in a claim for loss or damage caused by power failure or disruption, as opposed to claims of the kind of loss in negligent misstatement cases that follow from *Hedley Byrne*, there is a crucial distinction between economic loss consequent to damage which is recoverable, and pure economic loss independent of physical damage which is not recoverable. "(*Spartan Steel*) held that the claimant was entitled to recover the profits that were lost due to its own property being damaged by the power cut (a melt that had to be removed from the furnace) because these losses were the result of physical damage to the claimant's property. This is not regarded as pure economic loss, but the economic loss consequent on physical damage. The claimant was unable to recover the lost profit on four melts that would have been processed in the period when the power supply was cut. This constituted pure economic loss unrelated to any physical damage to the claimant's property" (*Clerk & Lindsell on Torts* at 8-139; *Charlesworth & Percy* (13th Ed) labelled pure economic loss as relational loss).
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> …
>
> [81] That the instant case fell within the established category of liability for damage caused by power failure or disruption was beyond argument.
> …

> [102] … In the case of damage caused by power disruption or failure, pure economic loss independent of physical damage is not recoverable (*Spartan Steel*). But the purport and effect of the order of the Court of Appeal – assessment of the entire claim – was that even pure economic loss independent of physical damage, as in the instant case, was recoverable. It would only stand to reason that the Court of Appeal would not have ordered assessment of damages of all and sundry, if the Court of Appeal were not of the view that all were recoverable. But as clearly illustrated in *Spartan Steel* and *SCM (United Kingdom) Ltd v. WJ Whittall and Son Ltd*, in the case of damage caused by power failure or disruption, only economic loss consequent to physical damage could be recovered. …

[58] We are unable to agree with such a proposition advanced as there is nothing in the case which supports it. The passages referred to would at best be seen as setting out the factual matrix. In fact, referring to the very same paras. 78 and 102, would show the opposite, namely economic loss consequent to physical or property damage is recoverable but pure economic loss independent of physical or property damage, is not.

[59] In para. 78, this is evident from the words "The claimant was unable to recover the lost profit on four melts … This constituted pure economic loss unrelated to any physical damage to the claimant's property". In para. 102, it was "The Court of Appeal ordered damages to be assessed. … failed to see that the damages claimed included both economic loss consequent to damage and pure economic loss independent of physical damage".

[60] Ultimately, this was said in para. 103 at p. 746 (CLJ); p. 619 (MLJ):

> [103] But it was so plain and obvious, self-evident, that the rest of the claimed losses and damages was pure economic loss independent of physical damage. The alleged loss consequent to failure to supply (RM4,368,363.20), the alleged loss consequent to termination of orders (RM40,710.40 and RM86,521.60), the alleged penalty for failure to supply (RM45,000 and RM60,000), the alleged loss of profits on account of the loss of the machinery (RM5,120,541.36), the alleged loss incurred on account of the loss of production and the profits thereof (RM32,651,550.43 and continuing), the alleged actions by banking institutions to recover loans (RM13,977.715.64), the alleged actions by suppliers to recover payments or debts (RM418,159.21), and the alleged loss of goodwill and market confidence in the plaintiff (RM3,000,000), even if true, were just pure economic loss independent of physical damage. …

[61] It was next submitted there is an exception provided in *Batu Kemas Industri* to the bar on negligence claims of pure economic loss as outlined in para. 66 at p. 726 (CLJ); p. 600 (MLJ):

> [66] In Malaysia, the 'fair, just and reasonable' element is well-established in cases concerned with economic loss and public services. Still it should be said that where a case fell within the established categories of liability, "a defendant should not be allowed to seek to escape from liability by

A appealing to some vague concept of justice and fairness" as the previous authorities "have by necessarily implication held that it is fair, just and reasonable that the claimant should recover" (Clerk & Lindsell at para. 8-24 citing Hobhouse LJ in *Perrett v. Collins* [1999] PNLR 77). Where a case falls within one of the established categories of liability, the *Caparo* three-fold test, which is to determine the duty of care in a new and novel
B situation, is inapplicable. Where a case falls within one of the established categories of liability, the third element in *Caparo* does not arise, as the previous authorities "have by necessarily implication held that it is fair, just and reasonable that the claimant should recover".

[62] We will also put in context the *Caparo* three-fold test as explained in
C paras. 50 and 51 at p. 594:

[50] *Caparo*'s "three-fold test" to determine a new situation duty of care, encompassed public policy concerns, probably, to limit "a liability in an indeterminable amount for an indeterminable time to an indeterminable class" (*Ultramares Corporation v. Touche* 255 NY 170, 174, N.E. 441 (1931)
D per Cardozo CJ) if Lord Atkin's neighbour principle were applied without restriction. In order for a duty of care to arise in negligence, (i) harm must be reasonably foreseeable as a result of the defendant's conduct (as established in *Donoghue v. Stevenson*), (ii) the parties must be in a relationship of proximity, and (iii) it must be fair, just and reasonable to impose liability.

E

[51] The three-fold test is clear enough. But courts must yet resolve what is 'fair, just and reasonable' and what are the 'public policy' concerns that militate against the imposition of a duty of care. In *Barrett v. Enfield London Borough Council* [2001] 2 AC 550, Lord Browne-Wilkinson explained that 'fair, just and reasonable' depends on the pro and cons of the imposition,
F or otherwise, of a duty of care:

> In English law, the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such
G class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

[63] According to the appellant, this meant that as long as there is an existing analogous precedent, there is no bar as the situation is no longer novel. The precedent relied on is *Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat*
H *Sidhu Adek Beradek Sdn Bhd & Anor* [2014] 6 CLJ 382; [2015] 8 MLJ 586.

[64] We are unable to accede to this proposition as *Puncak Niaga* was decided not on the basis of pure economic loss. This was said at para. 61 at pp. 405 to 406 (CLJ); pp. 608 and 609 (MLJ):

I

[61] The law with respect to a claim for special damages is clear in that the person who is claiming for such damages has to strictly prove the damages in court. However in the case of *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 2 MLJ 314; [2012] 1 CLJ 959, Justice Hishamudin Mohd Yunus JCA, in his judgment for the Court of Appeal held that:

> [93] In respect of claims for damages, we agree with the learned judge thai the burden is on the appellant to prove the damages claimed. We need only refer to the judgment of Ong Hock Thye FJ in the case of *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 MLJ 99; [1968] 1 LNS 43 wherein His Lordship said, *inter alia*, as follows:
>
> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover.
>
> *Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages.* Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:
>
> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it. (emphasis added)

[65] It then said at paras. 65 and 69 at p. 407 (CLJ); p. 610 (MLJ) as follows:

> [65] Due to the absence of supporting documents, I found that *Puncak Niaga* had failed to prove their claim for special damages.
>
> ...
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> [69] Be that as it may, the court is guided by the principle in *Tahan Steel Corporation Sdn Bhd* whereby even though the plaintiffs had failed to prove their claim for special damages, nominal damages can still be awarded to the plaintiffs as it can be reasonably presumed that the plaintiffs had suffered from certain amount of losses as a result of the breach by the first defendant. …

[66] Thus, it may well be that even if there is an exception, nevertheless that exception has not been made out.

[67] To conclude on this note, we are of the considered opinion that *Batu Kemas Industri* stands for the proposition that absent any physical and or property damage, pure economic loss is not recoverable. There is also nothing in *Batu Kemas Industri* that confined its application only to cases involving electricity.

[68] Nevertheless, as we have found the respondents liable in negligence, nominal damages can be awarded.

[69] Without detracting from the submission that there is no bar to a claim for pure economic loss, the appellant, by relying on *Puncak Niaga*, submitted on a range of RM50,000 to RM75,000. The respondents submitted on a range from RM10,000 to RM50,000.

[70] Taking into account the eight occasions of shutdown of the WTP and the ammonia pollution caused, we award nominal damages of RM100,000.

Conclusion

[71] For the above reasons, we allow the appeal on liability and damages, for which we award nominal damages only, of RM100,000. We set aside the order of the HC and award costs of RM100,000 here and below, subject to allocatur. We add that the costs of RM100,000 was sought by the appellant on the basis of the HC costs of RM50,000 and a further RM50,000 for the costs of the appeal. This was agreed by the respondents.